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NO. 82-1135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

CARL EDWIN WIGGINS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

I. DID THE ACTIONS OF STANDBY COUNSEL DENY RESPONDENT HIS RIGHT TO REPRESENT HIMSELF?

II. IS THE HARMLESS ERROR DOCTRINE APPLICABLE TO THE DENIAL OF THE RIGHT OF SELF-REPRESENTATION IN THIS CASE?

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STATEMENT OF THE CASE

A. Course of the Proceedings Below.

Although Respondent agrees generally with Petitioner's description of the proceedings below, Respondent writes to emphasize that he pleaded not guilty to the charges in the trial court and has continued to maintain his innocence of the charges. In connection with the federal district court's disposition of Respondent's application for writ of habeas corpus, Respondent would also point out that the court denied habeas relief without conducting an evidentiary hearing. Respondent contended in his appeal to the Fifth Circuit that the district court should have conducted an evidentiary hearing; due to the Fifth Circuit's reversal of the district court's decision, however, the appellate court did not reach Respondent's complaint on this point. Respondent has not abandoned this alternative claim.

B. Statement of the Facts

Respondent does not accept Petitioner's statement of the facts, largely because it contains Petitioner's interpretation of the facts and, in many instances, argument from the facts. Because the actual words and actions of the participants to this trial form the crux of the argument in this case, Respondent will refrain from arguing his case at this stage of the brief and refers the Court to his Argument for rendition of the facts. Nonetheless, certain assertions in Petitioner's statement of facts must be dealt with at this point.

The case arises out of the robbery of a Piggly Wiggly grocery store in San Antonio, Texas in the early evening of January 17, 1972. After the cashier stuffed money into a brown paper bag held by a man holding a rusty pistol, the

robber fled the store. A store employee wrote down the license plate number of a car the robber allegedly fled in, and that number was subsequently traced to a car owned by Carl Edwin Wiggins, who lived in Corpus Christi and who was contacted in his home in Corpus Christi only several hours after the robbery. After state courts dismissed two indictments because of defects, the trial that is the subject of this appeal began on June 4, 1973, a year and one-half after the offense occurred. In the afternoon of June 7, 1973, the jury began its deliberations, and, although the jurors announced several times later that night and the next day that they were deadlocked, the court refused to discharge them. (R. 508-15). The jury finally reached its verdict the afternoon of June 8, 1973. (R. 515).

Respondent's principal objection to Petitioner's statement of the facts is that it frequently indicates that Respondent approved of standby counsel's actions when in fact the passages cited by Petitioner often evidence no such acquiescence, and the only way to reach Petitioner's conclusion is to make assumptions about Respondent's state of mind. An equally plausible explanation for Respondent's actions at these moments is that Respondent elected not to quarrel with standby counsel so as to avoid disrupting the trial. (See: Petitioner's Brief at 5 wherein Petitioner claims that "at least once, Respondent specifically approved counsel's actions. (R. 50, 51, 52, 54)," and Petitioner's Brief at 6 wherein Petitioner claims that "[w]hile Respondent now complains of the actions of standby counsel, he more often than not approved of counsel's actions at trial. At various times during the trial, where counsel assisted in making objections or arguments, this action provoked no complaint or objection by Respondent," followed by numerous citations to the record.)

The facts demonstrate that standby counsel, over Respondent's repeated objections, continually interjected himself into the trial. (See, e.g. J.A. 8, 20). This unwanted participation included making motions on counsel's own intiative, giving orders to Respondent, cursing in the courtroom, and contradicting specific requests of the trial court and Respondent. (See, e.g. R. 345-46). Since it is the character, type and number of these interferences that Respondent contends deprived him of his Sixth Amendment right to represent himself, further discussions are reserved for Respondent's argument.

SUMMARY OF THE ARGUMENT

Respondent contends that the repeated, unwanted interjections by standby counsel prevented Respondent from exercising his Sixth Amendment right to represent himself. The actions complained of were not isolated, incidental interferences with Respondent's attempt to present his defense; rather, as the record demonstrates, standby counsel did everything but stand by: he initiated action on his own; he made motions for mistrial after Mr. Wiggins had specifically asked that he not do so; he cursed in the courtroom, both in and out of the presence of the jury; he intimidated Respondent by directing him on occasion to "shut up" or to "sit down;" and he destroyed any notion that Respondent was conducting a coherent, personal defense. These actions violated the unambiguous guidelines for standby counsel this Court established in *Faretta v. California*, 442 U.S. 806 (1975) wherein the Court said that standby counsel should aid the accused if and when the accused requested help.

The right to represent oneself surely encompasses more than the ability to appear at trial in order to contend with an unwanted court-appointed counsel for presentation of arguments to the jury. *Faretta* held that the right was given personally to the accused, as the accused bore the consequences of the verdict. The right, then, means not only that the accused has control over his defense, but also that he be able to personally present the defense of his choice. To hold otherwise would be to strip the right of self-representation of any meaningful content.

As a practical matter, a defendant who chooses to represent himself will be without the trial skills of an experienced advocate. Some pro se defendants will knowingly and some will unwittingly fail to object at trial to violation of their constitutional rights. Such a result derives inevitably, however, from the right of self-representation and does not argue for any special role for standby counsel as an indirect means of gutting a person's right to represent himself. A pro se defendant should not be treated any differently, insofar as his procedural waiver arguments and his tactical and strategical trial decisions are concerned, than a defendant represented by a lawyer.

The harmless error doctrine is logically incompatible with the analysis of the denial of the right of self-representation. Like its counterpart, the right to counsel, the right of self-representation is one of those rights so basic to a fair trial that its denial can never be harmless error. Since denial of the right of self-representation affects the conduct of the entire trial, attempting to assess the effect of the denial on the trial requires the reviewing court to speculate to a much greater extent than it does when reviewing the effect of a single piece of evidence or an erroneous jury instruction. Likewise, since the right is not related to the trial result and since the

harmless error inquiry focuses on result, the harmless error inquiry is irrelevant to a denial of the right of self-representation. Finally, if the Court adopts a harmless error standard, the inquiry should not focus on the result but should focus on whether the complained of error was more than an incidental interference with the defendant's conduct of his defense.

ARGUMENT

I.

RESPONDENT WAS DENIED THE EXERCISE OF HIS SIXTH AMENDMENT RIGHT TO REPRESENT HIMSELF.

Respondent contends that the actions taken by court-appointed standby counsel during his trial deprived him of his constitutional right to represent himself. Standby counsel continually interrupted the proceedings, made his own objections, ordered Respondent about, cursed, and even disobeyed the trial court's specific instructions designed to restrict his conduct. These actions so disrupted the proceedings that Respondent was prohibited from presenting his defense to the jury and to the court. The right of self-representation entitles a defendant to present his defense personally to the jury and to control tactical and strategical trial procedure. The record of Mr. Wiggins' trial shows that standby counsel's actions deprived Respondent of the Sixth Amendment protection accorded these interests.

When the trial court granted Respondent's request to represent himself in this case, the court also appointed standby

counsel "Mr. Ben Samples and also Mr. R. Norvell Graham, both practicing members of the San Antonio Bar, to assist Mr. Wiggins, to advise Mr. Wiggins if he wishes to be advised, or to consult with them when the Court directs he consult with them." (J.A. 7). Although *Faretta* empowered the trial court to appoint standby counsel, it also clearly delineated the role to be performed by standby counsel:

> Of course, a State may — even over objection by the accused — appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.

Faretta v. California, 422 U.S. at 835, n. 46.

These words are not ambiguous or difficult to interpret; they provide specifically that standby counsel is to aid the accused *if and when* the accused requests help and to be prepared to take over the conduct of the trial should the defendant become unruly. Beyond doubt, standby counsel in this case exceeded these clear guidelines; Petitioner does not even attempt to argue otherwise. Moreover, the record reflects that Respondent repeatedly requested, in words almost identical to those quoted above from *Faretta*, that standby counsel serve as a consultant or an advisor rather than initiating actions on his own. When Mr. Wiggins agreed to waive the ten day preparation period for one of his court-appointed counsel, Mr. Graham, who was appointed two days before trial, the court asks:

> THE COURT: The basis of that is that you expect to be an attorney for yourself pro se?
>
> DEFENDANT: Yes, Your Honor. In fact, not only that, I would like to waive his assistance, if I may.

THE COURT: The Court is not going to relieve you of that. Now, you can use it or not use it. It's available to you in this case.

DEFENDANT: Yes sir, but I would ask the court to ask Mr. Graham not to take the initiative to interfere with the defendant here, if I may do that?

THE COURT: Well —

DEFENDANT: I mean, if I want Mr. Graham's help I will ask for it and appreciate it if he wouldn't volunteer without me asking for it.

THE COURT: Well, Mr. Graham is a competent attorney and he has much experience in this type of thing and I am sure what he is trying to do is what he thinks is best for you. I am not going to order him to do or not to do anything. If some problem or situation arises, I will act on it at that time. I am not going to order him not to.

DEFENDANT: Your Honor, do I understand that the Court is forcing the services of Mr. Graham on the defendant?

THE COURT: His availability, yes.

DEFENDANT: May I except to that, Your Honor.

THE COURT: It's in the record.

(J.A. 13-14)

As indicated by the excerpts from the trial record contained in the Joint Appendix, Respondent repeated this request several times during the trial. (J.A. 8, 30, 53, and R. 345-46). Despite Respondent's requests and the trial court's initial description of standby counsel's limited role, Mr. Graham interjected himself into the trial constantly; nearly every page of the Joint Appendix documents some action taken by Mr. Graham that exceeds the guidelines of

Faretta. Respondent claims that standby counsel's violations of the direct, unambiguous guidelines this Court set out in *Faretta* deprived Respondent of the exercise of his Sixth Amendment right to represent himself.

A. The Right of Self-Representation Provides More than a Genuine Opportunity to Conduct a Defense; It Protects the Accused's Right to Present His Personal Defense.

Petitioner does not suggest that standby counsel's conduct did not exceed the clear boundaries articulated in *Faretta;* rather Petitioner contends that so long as Respondent was "afforded a genuine opportunity to conduct his defense," his right to self-representation was not violated and that the plain reading of *Faretta* adopted by the Fifth Circuit should be rejected as too restrictive. Petitioner claims that: "[t]he essence of the right protected in *Faretta* is the control over tactical decisions and defensive strategy, and the opportunity personally to participate in the trial of the case before the finders of facts. This, Respondent clearly did." (Petitioner's Brief at 11). Respondent submits that the right of self-representation recognized by *Faretta* involves more than "a genuine opportunity to conduct a defense."

Petitioner's definition of the right of self-representation would provide a defendant with little more than the vicarious control over important defense decisions which any defendant has, according to the canons of legal ethics, even when represented by a lawyer. At a minimum, the right of self-representation provides a defendant, during the course of the trial of his case, the right to personally present his defense to the trier of fact free from the continual harassment, distraction, and disruption of the proceedings by standby counsel.

Petitioner claims that because the trial court ruled in Respondent's favor every time a conflict arose between Respondent and court-appointed counsel, Respondent controlled his own defense which, in Petitioner's view, is all that is afforded by the right of self-representation recognized in *Faretta*. (Petitioner's Brief at 10-11). *Faretta* does not give so little; *Faretta* recognizes that merely controlling one's own defense is not the same as conducting it or presenting it oneself. "The right to defend is personal," the Court said. "The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. . . . And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' " 422 U.S. at 834 (citation omitted). The right to present your own defense is a logical extension of a criminal justice system, such as our own, in which culpability is based on an individual's responsibility for his acts. The right to self-representation thus strongly implicates our legal system's concern for free choice.[1] A person has the right to be convicted or acquitted with the knowledge that it was his claim the jury considered, presented in his own manner.

As the Fifth Circuit noted in its opinion in this case, there are a number of reasons why a defendant might choose to represent himself. *Wiggins v. Estelle*, 681 F.2d at 271, n.16, reh'g denied, 691 F.2d 213 (5th Cir.). A review of these reasons reveals that they correspond to interests which the

[1]As can be seen, this personal ingredient of the right to self-representation also involves societal concerns for freedom of expression and a public trial. A person engaged in civil disobediance may have resigned himself to conviction, but may wish to represent himself to communicate his arguments and his position on an issue he deems important to the society at large. *U.S. v. Dougherty*, 473 U.S. 1113 (D.C. Cir. 1972).

right of self-representation is designed to protect. Very important among these interests is the defendant's belief that he stands a better chance of acquittal if he presents his own case to the jury. As this Court noted in *Faretta*, "it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense." 422 U.S. at 834.

As the Fifth Circuit observed, an accused:

> ". . . may view self-representation as a means of invoking the jury's sympathy by projecting the image of the lone defendant against the mammoth State. Participation by court-appointed counsel would sour that image in the minds of the jurors. A defendant may also want the opportunity to have the jury judge him as a person, and hopefully decide all matters of credibility in his favor. As part of that plan, he may choose to take a very low key approach to trial, thereby conveying the impression that he has nothing to hide. In this situation, counsel's intrusion may force disagreements and confusion which would undermine the picture the accused wishes to present."

Wiggins v. Estelle, 681 F.2d at 271, n. 16.

A person has more than the right merely to participate personally in his defense when he elects to represent himself — he is not an actor to be wheeled out on the stage for a few lines and then again hidden behind the curtain. *Faretta* held that "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. . . . The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." 422 U.S. at 819-20.

As noted in *Faretta*, an "unwanted counsel" — whether standby or appointed representative — represents a defendant only through a legal fiction. "Unless the accused has

acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." *Id.* at 821. The italics in the original emphasize the personal nature of the defense. These passages simply do not support Petitioner's claim that *Faretta* only affords a defendant some vague control over the defense presented at trial. The concrete practical meaning of the right of self-representation is that the defendant, so long as his behavior is not inconsistent with the orderly progress of the proceedings, has the right individually and independently, which is to say, in person and without unwanted interference from any other individual, to present his defense at his trial. In short, he has the right to act as his own lawyer so long as he does not "abuse the dignity of the courtroom." *Id.* at 835, n. 46.

Petitioner cites *Chapman v. United States*, 553 F.2d 886 (5th Cir. 1977) as the source for its rule that all the Sixth Amendment entitles a defendant to is a genuine opportunity to conduct his defense. A careful reading of footnote 9 in *Chapman*, however, shows that the language the State refers to concerns an appellate court's ability to look behind a formal denial of the right of self-representation to determine whether an accused actually exercised the right at trial. In a discussion of whether denial of the right could ever be harmless error (not a discussion of whether the accused had been denied his right), the court postulated a case where the trial judge formally denied defendant his right to represent himself but then allowed the defendant to conduct his defense, despite the formal refusal. This situation, where the defendant actually conducted his defense, presented an example of the applicability of the harmless error rule in a case involving the right of self-representation, the *Chapman* court said. That hypothetical is the reverse of the facts in this case. As the State's use of

this example demonstrates, however, it is imperative to maintain a distinction between analysis of denial of the right and analysis of whether, once the right has been denied, it can never be harmless error. (See discussion at pp. 29-30, n.7, infra).

One additional flaw in Petitioner's formulation is that it is finally absurd to say that all an accused who asserts his right to represent himself is entitled to is an opportunity — genuine or of any other kind — to conduct his defense. If *Faretta* means anything, it means that every accused has an opportunity to represent himself if he wants it. But if the accused takes advantage of that opportunity, he then has the right to conduct his defense, not the opportunity to conduct it. Petitioner's standard seems to encourage a sort of controlled chaos in the courtroom where, once the trial court grants a defendant the right to represent himself, the defendent must vie with the standby counsel to conduct his defense, and, if he loses, he nonetheless had the opportunity to defend himself, so he should not be heard to complain.

B. The Record Reflects That Respondent Was Denied Exercise of His Right of Self-Representation, Under Either Petitioner's or Respondent's Definition of the Right.

An examination of the record reveals how mistaken it is to say that Mr. Wiggins presented his own defense. In fact, the record indicates that Mr. Wiggins was almost completely denied his right to control independently and present personally his defense. Consider, for example, the manner in which standby counsel gave orders to Mr. Wiggins during the examination of witnesses.

> DEFENDANT: Your Honor, I have some questions relative to the in-Court —

MR. GRAHAM: We will take him on cross-examination.

DEFENDANT: I would like to ask him. They are very relevant.

MR. GRAHAM: You can get him on cross-examination. Sit down.

(J.A. 20).

This exchange was not an isolated instance:

MR. GRAHAM: Ask him one question. Don't sit down and argue.

DEFENDANT: I am sorry.

(J.A. 21).

A true indication, however, of the extent to which standby counsel acted as though he, and not Mr. Wiggins, was in control of the defense (and an indication of his hostility toward the defendant) can be found in this exchange:

DEFENDANT: I want to ask him this question here on this statement that's dated February 15. May I show it to you?

MR. GRAHAM: God damn it. Wait a minute. I am trying to get . . . .

(Thereupon, Mr. Graham conferring with defendant.)

(J.A. 20).

This behavior not only indicates the vigor with which Mr. Graham obstructed Respondent's actual presentation of his defense but also reveals the sometimes crude, ill-mannered tone of Mr. Graham's performance as standby counsel. This Court has never sanctioned this type of language or behavior on the part of an accused and certainly not on the part of an officer of the Court.[2] This Court has stated that profanity in

[2]Chief Justice Burger has compared the importance of civility in a courtroom to the importance of antiseptic in a hospital. MORROW'S INTERNATIONAL DICTIONARY OF QUOTATIONS 311 (J. Green ed. 1982).

the courtroom is "reprehensible and cannot be tolerated." *In re Little*, 404 U.S. 553, 554 (1972). This was not the only time standby counsel cursed on the record. Even though Mr. Wiggins had specifically asked that standby counsel not request a mistrial, counsel ignored the request and, with the jury in the box, moved for a mistrial.

> DEFENDANT: No, Your Honor. I object to a mistrial. I object to counsel —
>
> THE COURT: I denied the motion for mistrial. Overruled.
>
> MR. GRAHAM: Jesus Christ.

(J.A. 40).

Regardless of what role standby counsel should play in a trial, it is difficult to imagine that any court would hold that the role should include language and conduct of this kind. Common decency prohibits it. It is also hard to fathom how utterances such as these, and incidents such as those related above, are compatible with the argument that Respondent controlled his defense. Surely not even a defendant represented by a lawyer of his own choice would want his lawyer to act in this fashion in the courtroom.

In addition to these incidents involving the use of profanity and an overbearing demeanor to intimidate Mr. Wiggins and disrupt his presentation of his case, the record indicates that standby counsel frequently made objections without first consulting the defendant who was supposedly controlling his defense. (See, e.g., J.A. 37, 47, 50, 52). Respondent's occasional failure to object to these actions leads Petitioner to claim Respondent in some way approved of standby counsel's conduct or at the very least acquiesced in it. (Petitioner's Brief at 10). An equally plausible explanation, in view of the unseemly behavior of standby counsel, is that Respondent,

who had already seen the jury witness many disagreements between himself and standby counsel, elected not to quarrel with standby counsel on these particular occasions to avoid any possible further aggravation of the jury.

There can be no question of acquiescence, however, in connection with Defendant's request that standby counsel not move for a mistrial. From the start of the trial, Mr. Wiggins expressed a concern with attempts, first by the prosecutor, (J.A. 15), to secure a mistrial, perhaps because, as he told the trial court, "I have been in jail, quite a long time." (J.A. 4). After standby counsel moved for a mistrial, Defendant asked the court to direct standby counsel to refrain from doing so.

> DEFENDANT: Your Honor, may I say something? I would like to say that I ask the Court to ask assistant counsels not to initiate their assistance unless it's — the Court considers it necessary and without unless the defendant asking for their help.
>
> THE COURT: To the extent that in the presence of the jury, I am so instructing them and I think they have been instructed. Now, they are conscientious lawyers —
>
> DEFENDANT: Yes, Your Honor.
>
> THE COURT: — they are experienced lawyers, and what they do within their oaths, they are advising you that they are seeking to advise you as to what they feel is beneficial to you in the trial of this — defense of this case, and I am not going to instruct them out from under their oaths or out from under their duty under these adverse circumstances. I will instruct them on your request that they not object or that they not —
>
> DEFENDANT: Ask for mistrial.
>
> THE COURT: — not do anything without consulting you. That they may consult and advise you as much as they feel it's in your interest and necessary and at other

times when you request it or at additional times when the Court orders it or suggests that there be a conference between you all.

DEFENDANT: Well, Your Honor, at times when the defendant is listening to the testimony and or questioning, cross-examining or examining a witness, now, will you ask counsels to wait until the testimony is over or hold up the proceedings for a moment, because the defendant can't listen to their voice and at the same time listen to the testimony.

THE COURT: All right. You can hold up your hand and I will stop the proceedings.

DEFENDANT: Thank you, Your Honor.

(R. 345-46). Despite this specific request and the court's ruling, standby counsel continued to move for mistrial, without consulting Mr. Wiggins. (J.A. 40, 45).

The disagreement over motions for mistrial demonstrates another deleterious effect of standby counsel's participation: counsel and Respondent were in almost continual disagreement over the tactical and strategical decisions of the defense. In the later stages of the trial, counsel took to dictating his recommendations into the record rather than carrying them out over Respondent's objection, surely a better procedure, but further indication of the extent of the dispute between the two. (J.A. 37, 41-2, 46).

Although the State contends that Respondent had a "genuine opportunity to conduct his defense," the facts related above belie this conclusion. Respondent was no more than one of two persons arguing his case, often in disparate ways, to the jury and to the court.

Respondent repeatedly requested that standby counsel refrain from initiation of any activity; he did not mind consulting with them, but he did not want them taking any actions

independently. These requests were entirely consistent with the role of standby counsel envisioned by *Faretta* and yet throughout the trial the court failed to impose any restrictions on standby counsel's participation or to state clearly standby counsel's role in the trial. The confusion engendered by this reluctance further contributed to Respondent's inability to present effectively his personal defense to the jury.

Almost from the moment the trial began, confusion surrounded the role of standby counsel. Although the trial court appeared to have established the roles of the trial participants when the subject first arose,[3] a dispute ensued almost immediately when Mr. Graham suggested that Mr. Wiggins' son was arrested in connection with the offense, and Mr. Wiggins protested.

DEFENDANT: Your Honor, I would like to defend

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[3]The trial court's subsequent reluctance to impose restrictions on standby counsel contrasts with the court's initial statements concerning standby counsel's role.

> DEFENDANT: Your Honor, I am defending myself and I feel that relative to the motions that I filed, that they can be heard without the transcript.
>
> MR. SAMPLES: Your Honor, there has — an issue has been raised as to the representation of Mr. Wiggins. The Court did appoint myself, Benjamin Samples to represent Mr. Wiggins, along with Mr. Norvell Graham who is here, and although I understand there was a previous trial and Mr. Wiggins did at that time represent himself, I don't know whether the determination has been made by this Court as to who is going to represent whom.
>
> THE COURT: Well, Mr. Wiggins has a right to represent himself, and under the law the Court has made available to him for consultation and/or use, that he would wish to make within the framework of your professional abilities, both you and Mr. Graham who will be available, that he may consult with whoever he wishes to consult.
>
> Now, as I understand the law, he has a right to represent himself as long as he does that within the framework of the law and the

myself. I would appreciate it, sir if you would ask this man to let me defend myself.

MR. GRAHAM: Certainly. Help yourself.

DEFENDANT: I would be grateful. I have not solicited his assistance, Your Honor, and I don't want it.

THE COURT: You are going to get help and/or assistance from him because you are obviously not a lawyer.

DEFENDANT: Yes sir. I am not a lawyer.

THE COURT: And this trial, if we do go into it, is going to be conducted according to the rules of law.

DEFENDANT: Yes sir.

THE COURT: And there might be an occasion when this Court is going to require that you consult with them as to what the proper procedure may be.

---

rules of the proper conduct of the trial.

There may be times when his knowledge and ability is not such that he is doing it properly and it may be that the Court at that time will suggest to him that he consult with counsel, but counsel will be here at the counsel table with him and confer with him as he wishes.

* * *

Let the record show that the defendant, Mr. Carl Edwin Wiggins, has by his own design, elected to be attorney for himself pro se, but that the Court has appointed previously Mr. Ben Samples and also Mr. R. Norvell Graham, both practicing members of the San Antonio Bar, to assist Mr. Wiggins, to advise Mr. Wiggins if he wishes to be advised, or to consult with them when the Court directs he consult with them, that they are here present in Court and available sitting right behind him.

You may proceed.

(J.A. 6-7). As this dialogue indicates, the court apparently originally contemplated a purely standby role for counsel. The role outlined in this statement would appear roughly to conform with the *Faretta* guidelines.

DEFENDANT: Yes sir.

THE COURT: You will have every right made available to you under the law, as this Court is able to determine.

DEFENDANT: I appreciate that, Your Honor, but for assistant counsel to initiate something that the defendant does not want, I would like to consult with the attorneys for advice. I will appreciate that, but for counsels to initiate something that is contrary to the defendant's defense, well, then, I couldn't appreciate that.

(J.A. 8-9).

The second manifestation of the trial court's reluctance to establish clearly standby counsel's role during the trial was reflected in the colloquy quoted above (see p. 6-7, supra) involving Mr. Wiggins' waiver of the ten-day preparation period for Mr. Graham when Mr. Wiggins told the court he would appreciate Mr. Graham's assistance if asked for but could not appreciate "volunteer" assistance absent a request. (J.A. 14). The trial court's confusion about the roles of the participants was also evident when it stated to the jury that Mr. Graham and Mr. Samples were appointed "to represent and assist Mr. Wiggins where he desires to use their help." (J.A. 16). Obviously, Mr. Wiggins never asked that standby counsel represent him, but standby counsel could easily have interpreted this language to provide them with license to act as Mr. Wiggins' lawyers, not just as his advisors.

As a result of the trial court's ambiguous statements to the jury concerning standby counsel's role and the court's refusal to restrain counsel, it is unclear whether the court ever actually permitted Respondent to represent himself. The court's rulings indicated that the standby counsel were free to take any action they deemed appropriate and that the court would simply determine the propriety of such action on an ad

hoc basis — "if some problem arises, I (the judge) will act on it at that time." The jury was undoubtedly well aware of this unsettled state of affairs, as the following exchange, wherein Mr. Graham calls himself Respondent's attorney, and which took place in front of the jury, illustrates:

THE COURT: Do you have any additional questions of this witness?

MR. GRAHAM: Your Honor, there is one question that I feel as his attorney should be asked.

THE COURT: Now, counsel, we have ground rules here. The question is whether or not the defendant want (sic) to ask the question.

DEFENDANT: Well, Your Honor, I do have — trying to think of a question or two, but . . . I would like to ask him again . . . if it's . . .

THE COURT: Don't ask him anything that you have asked him before. In other words, don't try to trod on the same ground over and over. The jury heard it. It's fresh in their minds.

MR. GRAHAM: Your Honor —

DEFENDANT: I believe I will pass the witness.

MR. RODRIGUEZ: May he be excused?

MR. GRAHAM: Just a moment. Can we confer? Counsel feels the defendant should require that the question be asked.

THE COURT: Ladies and gentlemen, I have been abusive of you this morning because of various matters that we have had to take up in your absence. I haven't really given you a recess except haphazard ones. On instructions previously given you, I am going to give you a fifteen-minute recess at this time. Remember my instructions. You may go anyplace you like, no farther than seven and a half minutes away.

(Thereupon, jury withdrawn from the courtroom.).

(J.A. 28-29).

Even at this late stage in the trial, the judge attempts to sort matters out between counsel and the accused, by stating that Mr. Wiggins' judgment would control in matters that involve a judgment decision, but the judge also noted that:

> It's peculiar to work under these conditions, but this is what we are going to have to do.
>
> DEFENDANT: May I say it is peculiar to me, Your Honor and I would really appreciate it if I could — if I could conduct my defense without the assistance and interruptions of counsel, with all respect, Mr. Graham.
>
> THE COURT: All right.
>
> MR. GRAHAM: I will sit third chair from now on. I will move back one notch.
>
> THE COURT: I am not going to order you Mr. Graham, because I know you are competent counsel, but let me suggest to you that unless he consults with you — you do your thing anyway, but don't object or don't ask questions unless and until the Court request that you consult with him because he doesn't know the proper way to do something.
>
> DEFENDANT: Thank you, Your Honor.

(J.A. 30-31).

The trial judge's statement vividly expresses the conflicting signals given to Respondent and to standby counsel; standby counsel is to stand by for consultation but also to do his "thing" anyway. Petitioner's characterization of the record in this case as reflecting that standby counsel's conduct did not deprive Mr. Wiggins of his Sixth Amendment right of self-representation is no less contradictory, for it asserts that even when standby counsel repeatedly interrupts, criticizes, curses and attempts to intimidate the defendant and spends a substantial portion of the trial standing up to interject his own statements and questions rather than merely standing by, the

defendant has exercised his constitutional right of self-representation.

The trial court's reluctance to impose any restraints on the conduct of standby counsel can only have led Respondent "to believe that the law contrives against him." *Faretta*, 422 U.S. at 834. Mr. Wiggins, who asserted his innocence at the time and who continues to maintain his innocence of the crime charged, can only wonder what verdict the jury, which several times announced to the court that it was deadlocked, might have returned if he had been permitted to present his defense free from interference.

C. This Court's Waiver Decisions Preclude a Pro Se Defendant or Standby Counsel from Sandbagging a Trial Court.

Although Petitioner does not posit a role for standby counsel in a trial involving a pro se defendant, Petitioner's criticism of the Fifth Circuit opinion centers almost completely on the language in that opinion that establishes guidelines for standby counsel. Reduced to essentials, Petitioner has two criticisms: (1) the rule will allow standby counsel and pro se defendants to sandbag the courts; and (2) the rule will require the trial court to remain mute which may be detrimental to the interests of the State in ensuring fundamental fairness in criminal proceedings. (Petitioner's Brief at 14). The short answer to both criticisms is that when an accused chooses to represent himself, he can waive his constitutional rights just as finally as if his lawyer had done it for him; thus, the guarantees of fairness inherent in trial proceedings are not altered.

The State's sandbagging argument apparently envisions

two types of sandbagging. First, a careless or unscrupulous standby counsel might introduce error into the proceedings by occasionally interjecting a comment or objection that, under the Fifth Circuit's "rigid" rule, would constitute constitutional error. (Petitioner's Brief at 12, n.2). Second, a pro se defendant or standby counsel, when a constitutional violation is being committed, may not raise the point at trial, either through an intentional decision to take a risk on a verdict while reserving the constitutional argument for appeal, or through ignorance. Although this second type of sandbagging was only hinted at in Petitioner's Brief at 14, n.5, it appears to have been a concern for the dissenters in the lower court. 691 F.2d 213, 215 (Jolly, dissenting) ("I am concerned that it presents opportunities for ill-motivated defendants (or their attorneys for that matter) to set-up and sandbag the trial court into committing error.").

In the case of an inconsequential and unsolicited remark by standby counsel, the trial court may correct this type of conduct by instructing the jury to disregard the remark and directing standby counsel to refrain from making any further remarks. If the trial court fails to take these corrective measures, under appropriate circumstances, the reviewing court should have the power to determine that an isolated instance of unsolicited action by standby counsel did not deprive the defendant of the exercise of his right of self-representation if such action only incidentally interferred with the defendant's presentation of his defense.[4]

[4]The Petitioner's "sandbagging" arguments might further be criticized as being unduly skeptical of the motives of defendants and standby counsel. The sandbagging argument advanced here is analogous to arguing that there should be no habeas relief for claims of ineffective assistance of counsel because the availability of such a remedy will encourage lawyers to defend their clients poorly.

The more complicated question, perhaps, involves the problem presented by the second type of sandbagging when an accused either fails to recognize that one of his constitutional rights is being violated or intentionally decides to risk the trial result and, if it is unfavorable, to raise the constitutional violation on appeal.

The fundamental flaw in this argument is that it assumes the defendant will be able to raise a claim he overlooked or intentionally decided not to present at trial on a later appeal or petition for collateral relief. When an accused chooses to represent himself, he undertakes to serve as his own lawyer, or just as he would be bound by his lawyer's tactical or strategical decisions, so should the pro se defendant be bound by his trial decisions. This Court has held that when an accused, represented by an attorney, failed to object at trial to the admission of an arguably involuntary confession, the accused had waived his right to raise the constitutional argument on appeal, absent a showing of cause and prejudice. *Wainwright v. Sykes*, 433 U.S. 72 (1977). See also *Engle v. Isaac*, 456 U.S. 107 (1982). Thus, the *Wainwright* waiver rule would bar a pro se defendant who failed to make a required objection from seeking habeas relief, absent a showing of cause and prejudice. Faced with an accused representing himself, the State should prosecute the case in exactly the same manner it would if the accused had a lawyer. If an accused's lawyer made a decision at trial to permit introduction into evidence of constitutionally infirm evidence, the State would certainly argue that the accused should be bound by that decision, even if the lawyer failed to object out of ignorance. The State should be able to avail itself of this same waiver argument in the case of a pro se defendant who fails to object to the violation of a constitutional right.

A judgment of conviction entered following a trial in which the defendant represented himself is, therefore, subject to no unique risks of reversal resulting from the defendant's exercise of the right of self-representation. The defendant will have precisely the same post-judgment remedies available to him as if he had been represented by counsel, no less and no more. An accused who thus waives assertion of a constitutional right is faced with the same hurdles to habeas relief as an accused with a bad lawyer or a lawyer who made the wrong decisions. Regardless of whether the defendant proceeds pro se or with counsel, the trial court has a duty to avoid and prevent a fundamentally unjust incarceration or a fundamental miscarriage of justice. *Engle v. Isaac*, 456 U.S. at 135. As the court noted in *Engle*, victims of a fundamental miscarriage of justice will meet the cause and prejudice standard; and this result would hold whether an accused had a lawyer or represented himself.

Closely related to Petitioner's sandbagging argument is Petitioner's claim that "the test adopted by the lower court establishes a rule which totally binds the hands of a trial judge confronted with a defendant exercising his *Faretta* right." (Petitioner's Brief at 12). This argument reflects the concern of the dissenters in the lower court that the rule "places judges in an impractical, inflexible strait-jacket." 691 F.2d at 215 (Jolly, dissenting). Respondent fails to see how a trial judge's hands are any more tied when dealing with a pro se defendant than with an accused's lawyer.

Petitioner goes on to claim that the rule requires the trial court to remain "mute" which may be detrimental to the interests of the state in ensuring fundamental fairness in criminal proceedings. (Petitioner's Brief at 14). Although the Fifth Circuit opinion clearly holds that the trial court should require standby counsel to remain mute unless consulted by

the accused, the opinion nowhere imposes such a restriction on the trial judge. Moreover, neither the Fifth Circuit opinion nor Respondent's reading of *Faretta* preclude a trial judge from suggesting that a defendant consult with standby counsel concerning a legal objection or trial matter about which the judge feels the defendant should be apprised.[5]

The fairness of the trial is built into the proceeding itself. The rules governing trial procedure are not abandoned when a defendant chooses to represent himself anymore than they are abandoned when a defendant has an incompetent lawyer. A fundamentally unjust incarceration or a fundamental miscarriage of justice can and should be cured whether a defen-

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[5]The rule adopted by the Fifth Circuit is consistent with the role the American Bar Association contemplates for standby counsel, and the ABA Guidelines for the Administration of Criminal Justice (2d ed. 1980) provide some guidance in this area. Standard 6-3.7 provides in part that:

> When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his or her motion.

ABA Guidelines for the Administration of Criminal, Justice Special Functions of the Trial Judge, Standard 6-3.7 (2d ed. 1980). The Standards suggest that there is no inconsistency between a strictly limited role for standby counsel and the state's interest in a fair trial because the trial judge has an affirmative duty to protect the rights of a pro se defendant and to ensure a fair trial. Standard 6-3.6(b) provides that "when a litigant undertakes to represent himself or herself, the court should take whatever measures may be reasonable and necessary to ensure a fair trial." *Id.* at 6-38. This rule surely does not mean that a trial judge should become the defendant's lawyer in place of the lawyer the accused refused. Instead, it simply recognizes that in proceedings involving a pro se defendant, just as in cases where a defendant employs counsel, the judge should be on the alert to avoid the commission of fundamental error that would jeopardize the finality of the trial result.

dant represents himself or whether he has a lawyer. The ultimate extension of the State's argument is that any trial with a pro se defendant is unfair; this argument requires overruling *Faretta*.

II.

IN THIS CASE, THE HARMLESS ERROR DOCTRINE IS NOT APPLICABLE TO THE DENIAL OF THE RIGHT OF SELF-REPRESENTATION.

A. Denials of the Right of Self-Representation Can Never Be Harmless.

When the Court first applied the harmless error doctrine to federal constitutional violations, it indicated that "there are some constitutional rights so basic to a fair trial that their infraction can never be harmless error," and referred to the right to counsel, the right to an impartial judge and the right not to have a coerced confession used against an accused as among those basic rights. *Chapman v. California*, 386 U.S. 18, 23, n.8 (1967). In subsequent cases applying the harmless error doctrine, the Court has continued to acknowledge the peculiar inapplicability of the harmless error doctrine to at least the three rights enumerated above. See, e.g., *United States v. Hasting*, 103 S. Ct. 1974, 1980 (1983).

Respondent contends that the right to self-representation is among those basic rights whose "infraction can never be treated as harmless error." The most obvious analog is to the right to counsel. At trial, a defendant is either represented by counsel or by himself. The right to represent oneself is thus parallel to the right to counsel and seemingly of equal digni-

ty. If a defendant waives his right to counsel, he does so to represent himself, the only other choice. If he is subsequently denied his right to represent himself, then he has been tried without counsel, either his own or that of a lawyer. As a matter of logic, therefore, the right to represent oneself would seem as basic to a fair trial as the right to counsel.[6]

Additionally, the denial of the right to assistance of counsel can never be harmless error because that error permeates the entire trial. In the normal case where a harmless error rule is applied, the reviewing court examines a particular aspect or moment of the trial and therefore can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. *Holloway v. Arkansas,* 435 U.S. 475, 490 (1978). By contrast, the reviewing court cannot reconstruct the effect a lawyer would have had on an entire trial with any hope of reasonable accuracy. Likewise, review of the denial of the right of self-representation requires the appellate court to review the entire record and is therefore subject to too much uncertainty "to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States,* 315 U.S. 60, 76 (1942).

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[6]It may also be true that the Court has decided this issue. In *Bittaker v. Enomoto,* 587 F.2d 400 (9th Cir. 1978), *cert. denied* 441 U.S. 913 (1978), the Ninth Circuit specifically refused to apply the harmless error doctrine to denials of the right of self-representation and affirmed the district court's grant of habeas relief on the grounds that the defendant was denied his right of self-representation. 587 F.2d at 402. This Court subsequently denied certiorari. 441 U.S. 913 (1978). See also *Young v. State,* 653 P.2d 153 (Nev. 1983). Justice Blackmun anticipated this issue in his dissent to *Faretta* when he asked, "May a violation of the right to self-representation ever be harmless error?" 422 U.S. at 852 (Blackmun, J. dissenting).

The right to self-representation also resists application of the harmless error doctrine because the right is not result oriented. *Chapman v. United States,* 553 F.2d 886, 891 (5th Cir. 1977).[7] *Faretta* itself acknowledges that as a practical matter assertion of the right to self-representation will, more often than not, result in a less skilled defense than if counsel guided the defense. 422 U.S. at 834. Moreover, the Sixth Amendment guarantees a defendant the right to conduct his own defense not necessarily because he will do a better job of it, but because "it is he who suffers the consequences if the defense fails," 422 U.S. at 820, and also because "the right to defend is personal." 422 U.S. at 834. The harmless error doctrine, however, focuses directly on

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[7]As the *Chapman* court noted:

> The nature of the right to defend pro se renders the traditional harmless error doctrine peculiarly inapposite. Unlike other constitutional rights, the right to represent oneself is not "result-oriented." The normal operation of the harmless error doctrine is in cases where the challenged error concerns a right accorded the defendant to facilitate his defense or to insulate him from suspect evidence. *See United States v. Dougherty,* 154 U.S. App. D.C. 76, 473 F.2d 1113, 1127-28 (1972). By contrast, we recognize the defendant's right to defend pro se not primarily out of the belief that he thereby stands a better chance of winning his case, but rather out of deference to the axiomatic notion that each person is ultimately responsible for choosing his own fate, including his position before the law. A defendant has the moral right to stand alone in his hour of trial and to embrace the consequences of that course of action. . . .
>
> Accordingly, it is wholly irrelevant whether the result of Chapman's trial might have been different had the court deferred to his wish to represent himself. The only grounds appellee adduces for applying the harmless error doctrine pertain to result.

553 F.2d at 891-92.

As Respondent noted above in his analysis of Petitioner's reading of *Chapman's* 'genuine opportunity' to present his defense, the *Chapman* court does suggest another use of the harmless error test in this context.

result; the reviewing court asks if the evidence of guilt is so overwhelming that the court believes that the error was harmless beyond a reasonable doubt. *United States v. Hasting,* 103 S. Ct. 1974, 1981 (1983); *Milton v. Wainwright,* 407 U.S. 371, 378 (1972); *Harrington v. California,* 395 U.S. 250, 254 (1969); *Chapman v. California,* 386 U.S. at 24. It is clear then that the court assesses the weight of the evidence to determine the effect of the constitutional error on the jury's verdict. *Harrington v. California,* 395 U.S. at 254; *Connecticut v. Johnson,* 103 S. Ct. 969, 981-82 (1983) (Powell, J. dissenting). To guess at what evidence an accused would have admitted or objected to, to guess at what strategy the

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The court said:

> There is, however, another sense of "prejudice" in this dictum from *Juelich* that illustrates a more appropriate use of the harmless error doctrine. The court noted that defendant was not prejudiced because he was permitted to question witnesses, argue his case, assign additional grounds for his §2255 motion, and otherwise directly participate in the proceedings, despite his request to defend pro se having been denied. *United States v. Juelich,* 342 F.2d at 33. A defendant afforded a genuine opportunity to help conduct his defense may be in no way harmed by the denial of his formal motion to defend pro se.

553 F.2d at 891, n.9.

A comparison of that hypothetical with the facts of this case demonstrates that the harmless error doctrine is inapposite here. Here, the court apparently granted the defendant the right to proceed pro se, but the subsequent conduct of standby counsel deprived Respondent of the right. There, the court formally denied the defendant the right to proceed pro se, but the defendant actually presented his own defense. Respondent asserts, however, that even in the *Chapman* hypothetical, the better analysis would be that no denial of the right occurred rather than that the denial was harmless error. Under Respondent's analysis, the Court should look to what the defendant did at trial; if he conducted his defense, he was not denied the right to proceed pro se, regardless of the trial court's formal ruling.

accused would have adopted if he had been permitted to represent himself, or, in other words, to guess the effect on the jury's verdict of denying an accused the right to conduct his own defense requires the reviewing court to engage in speculation beyond that required to weigh the effect of a violation of a result oriented right such as admission of improper evidence. The pertinent inquiry, however, is not would he have been convicted anyway, absent the error, (that question is irrelevant to the right of self-representation) but instead, was it the defense that the accused put forward that was considered and rejected? *United States v. Dougherty,* 473 F.2d 1113, 1128 (D.C. Cir. 1972).

The harmless error inquiry in a case involving the Sixth Amendment right to conduct one's own defense is the same inquiry used when determining initially if the accused was accorded the right. This results in considerable confusion when attempting to apply the doctrine in these cases and leads to the conclusion that the harmless error inquiry in these instances is essentially redundant.

Petitioner's wording of the second question presented by this case demonstrates this problem. The issue asks:

> Has the Fifth Circuit extended *Faretta v. California* by presuming prejudice where standby counsel assists a pro se defendant, even though the defendant had a genuine opportunity to represent himself?

(Petitioner's Brief at i).

In its argument on the first issue in this case, Petitioner contended that if a pro se defendant is given a genuine opportunity to present his defense, then he has not been denied his right to represent himself. Now Petitioner contends that when a defendant is given a genuine opportunity to conduct

his defense, any denial of his right was harmless error. Under Petitioner's analysis, the second question is superfluous because if defendant is given a genuine opportunity to conduct his defense, the harmless error question is never reached. The analysis is thus clearly tautologous.

Nonetheless, Petitioner asks the Court to use this circular reasoning in the analysis of the right of self-representation as an alternative to the Fifth Circuit's analysis:

> Petitioner urges this Court, instead, to adopt the 'genuine opportunity' inquiry as the standard of review *and* test for prejudice.

(Petitioner's Brief at 19) (emphasis added). Should the Court decide to adopt the "genuine opportunity" inquiry to determine if a defendant is deprived of his right to represent himself, Respondent contends the same question should not then be asked to determine if the denial was harmless error.

Respondent also contends that Petitioner has mischaracterizes the Fifth Circuit's holding as establishing "a presumption of prejudice where standby counsel assists a pro se defendant." Nowhere in the opinion can support for this reading be found. Petitioner states that the court "found that a presumption of prejudice would be applied where a standby attorneys (sic) is 'heard as well as seen'." (Petitioner's Brief at 17). Although no citation to the opinion accompanied this assertion,[8] repeated examination of the opinion revealed

[8]Petitioner's only citation, to *United States v. Frady*, 102 S. Ct. 1584 (1982), a case involving procedural waiver, is perhaps useful as a suggestion for the origin of Petitioner's "presumption of prejudice" language, but it does not appear to provide any aid in a harmless error analysis. In *Frady*, the Court held that to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show (1) "cause" excusing his double procedural default, and

only one mention of prejudice in this context. The Fifth Circuit noted that although "interjections made in the presence of the jury are inherently prejudicial, and are therefore subject to strict scrutiny, statements made outside their presence are not to be discounted." 681 F.2d at 274, n. 27. That observation only applies to one class of remarks — those made in the presence of the jury — rather than to *any* assistance from standby counsel and it further only subjects those remarks to strict scrutiny.

When this footnote is read in the context of the sentence to which it is attached, it becomes apparent that the Fifth Circuit contemplated an examination of the record as a whole to determine if the error was harmless beyond a reasonable doubt. The Fifth Circuit held that "[i]n order to make such a determination, an examination of the record as a whole is necessary; passages are to be examined in context, and evaluated in light of their affect on the total mix." *Id.* at 274.

As the Fifth Circuit's attempt to find a workable way to use the harmless error standard in this setting demonstrates, the real problem is that the harmless error standard may not be logically applicable to cases involving the right of self-representation. The Fifth Circuit apparently applied the doctrine in this case to avoid automatic reversals for an

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(2) "actual prejudice" resulting from the errors of which he complains. 102 S. Ct. at 1594. Because the specific defect complained of in *Frady* involved a jury instruction, the Court held that the single instruction should not be judged in isolation, but must be viewed in the context of the overall charge. *Id.* at 1595. It is of course precisely because of the difficulty of evaluating the effect of the denial of the right of self-representation in a trial that it should be treated differently than a constitutional violation traceable to a single action or piece of evidence.

incidental violation of the right of self-representation. Additionally, the lower court sought to avoid sandbagging by unscrupulous counsel: "All that would be necessary to secure a new trial for a defendant whose conviction is a foregone conclusion would be for counsel to throw himself into the fray." 681 F.2d at 274.

Because application of the harmless error doctrine in these situations is inappropriate, Respondent suggests that the concerns expressed by the Fifth Circuit are more properly handled in the initial determination of whether the actions by standby counsel resulted in a denial of the exercise of the right. Thus, a minor outburst by overzealous counsel who momentarily forgets his standby role, can be cured by instruction or may not constitute a denial of the right because it only incidentally interfered with a defendant's conduct of his defense. The trial court should admonish, immediately, standby counsel who seeks to thwart the State, the court and the defendant by interjecting himself into the fray, and, if standby counsel continues his sabotage efforts, the trial court should use the many means at its disposal, including contempt, to control this conduct.[9]

B. The Denial of the Right of Self-Representation was not Harmless Error Under the Facts of this Case.

In the alternative, should the Court decide that a harmless error inquiry is proper, Respondent contends the inquiry

[9]As Chief Justice Burger noted in his dissent in *Faretta:* "Instances of overbearing or ineffective counsel can be dealt with without contriving broad constitutional rules of dubious validity." 422 U.S. at 837, n.1 (Burger, C. J., dissenting).

should focus on whether the accused actually presented his defense. This is the sense, as indicated above, in which the Fifth Circuit felt the harmless error standard might be applicable. *Chapman v. United States,* 553 F.2d 886, 891, n.9 (5th Cir. 1977). If the Court decides that the participation of standby counsel in this case denied Respondent the exercise of his Sixth Amendment right, the State should be required to prove beyond a reasonable doubt that the participation only incidentally interfered with Respondent's conduct of his defense. WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1142 (1969)defines incidental as "a. occurring merely by chance or without intention or calculation: occurring as a minor concomitant. . . ." Respondent's repeated requests that standby counsel refrain from initiating action on his own eliminate any possibility that standby counsel's actions were taken by chance. The constant pattern of interference also clearly indicate that standby counsel, regardless of motive, was acting intentionally. Under the facts of this case it stretches belief to argue that standby counsel's actions were mere accidental outbursts.

Respondent contends that standby counsel constantly, often rudely, interfered with Respondent's presentation of his defense. As the lower court noted, counsel's actions "destroyed Wiggins' own perception that he was conducting *his* defense." 681 F.2d at 275 (emphasis in original). Therefore, the denial of the right constituted more than an incidental interference with Respondent's presentation of his defense, and the denial of the right was not harmless error.

CONCLUSION

For these reasons, Respondent prays that this Court affirm the judgment of the United States Court of Appeals for the Fifth Circuit. In the alternative, if this Court should reverse the judgment of the Fifth Circuit, Respondent prays that this Court remand the case with instructions that the district court conduct an evidentiary hearing on Respondent's claims.

Respectfully submitted,

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